

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

**Paul M. Clark, Appellant,**

**v.**

**Army and Air Force Exchange Service, Agency.**

Docket Number DA1221920443-W-1

Date: April 9, 1993

Robert Le Roy Williamson, American Federation of Government  
Employees, Dallas, Texas, for the appellant.

Peter A. Campagna, Dallas, Texas, for the agency.

**BEFORE**

Daniel R. Levinson, Chairman  
Antonio C. Amador, Vice Chairman  
Jessica L. Parks, Member

**OPINION AND ORDER**

The appellant has filed a timely petition for review of an initial decision that dismissed his appeal for lack of Board jurisdiction. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this appeal on our own motion under 5 C.F.R. § 1201.117, however, and AFFIRM the initial decision, still DISMISSING the appeal for lack of Board jurisdiction.

**BACKGROUND**

The appellant, an employee of the Army and Air Force Exchange Service (AAFES), filed an appeal asserting that the agency had taken various adverse personnel actions against him in retaliation for disclosures of fraud, waste, and abuse that he had made in December 1990. See Initial Appeal File (IAF), Tab 1. The administrative judge advised the appellant that, as an employee of a non-appropriated fund agency, he might not have the right to appeal to the Board and ordered him to file evidence and argument on that issue. See IAF, Tab 2. The appellant responded to the order. See IAF, Tab 4. The administrative judge

issued an initial decision, finding that the Board did not have jurisdiction over the appeal and dismissing the appeal. See IAF, Tab 7.

The appellant has filed a timely petition for review asserting that the administrative judge erred in not finding jurisdiction. Along with his petition for review, the appellant has submitted copies of an appeal to the Office of the Special Counsel (OSC), a written reprimand, a performance appraisal, various office memoranda, and a letter from OSC declining to investigate his complaint for lack of jurisdiction. See Petition For Review (PFR) File, Tab 1.

The agency has timely responded in opposition to the petition for review and included copies of an arbitrator's award and a decision on exceptions to the arbitrator's award. See PFR File, Tab 3.

### ANALYSIS

The Board's jurisdiction is not plenary but is limited to that granted by law, rule, or regulation. See *Shaw v. Department of the Navy*, 39 M.S.P.R. 586, 588-89 (1989). An employee may appeal certain enumerated adverse personnel actions to the Board under authority granted in 5 U.S.C. § 7513(d). Under subsection (c) of 5 U.S.C. § 2105, the code provision that defines “employee” for the purposes of Title 5 unless specifically modified, an employee paid from nonappropriated funds of AAFES and other entities is, with certain exceptions not here relevant, not an “employee” for the purposes of laws administered by the Office of Personnel Management (OPM). In *Taylor v. Department of the Navy*, 1 M.S.P.R. 591, 592-95 (1980), we held that the adverse action provisions of Title 5 are laws administered by OPM for the purposes of 5 U.S.C. § 2105(c). Thus, we have long held that 5 U.S.C. § 7513(d) does not provide nonappropriated fund (NAF) employees with a right to appeal an adverse personnel action to the Board. See *id.* at 596.

The appellant conceded below that the Whistleblower Protection Act (WPA) also does not provide the Board with jurisdiction over his appeal. See IAF, Tab 4. Nevertheless, he argues on petition for review that the Board has jurisdiction because he is an employee as defined in 5 U.S.C. § 2105 for purposes of laws not administered by OPM and that OPM does not enforce or administer 5 U.S.C. § 2302(b)(8). Thus, he contends that he is an employee under 5 U.S.C. § 2302 for purposes of alleging a violation of 5 U.S.C. § 2302(b)(8) and therefore has a right to file a WPA independent right of action appeal (IRA) with the Board. See PFR File, Tab 1. He argues that OSC always had the right to bring a complaint seeking corrective action for a 5 U.S.C. § 2302(b)(8) violation on behalf of a NAF employee and that the WPA enables the affected NAF employee to bring a 5 U.S.C. § 2302(b)(8) complaint to the Board as an IRA.

Under 5 U.S.C. § 2302(b)(8), an agency may not take a personnel action against any employee in reprisal for making a protected disclosure. OSC has authority to investigate allegations of personnel practices in violation of 5 U.S.C. § 2302(b)(8) and to take corrective action as necessary. See 5 U.S.C. § 1214. An employee may seek corrective action from the Board if OSC notifies him that its investigation is terminated or if it does not notify the employee within 120 days of the filing of his complaint that it will seek corrective action on his behalf. See 5 U.S.C. §§ 1214(a)(3) and 1221(a). The language of these statutory provisions makes them applicable to “employees” and does not modify the 5 U.S.C. § 2105 definition of “employees.”

The appellant offers no support for his contention that these provisions are not laws administered by OPM and therefore are not covered by 5 U.S.C. § 2105(c). See PFR File, Tab 1. OPM is the agency primarily charged with administering rules, regulations, and statutes governing the civil service. See 5 U.S.C. § 1103(a)(5); see also *Perez v. Army and Air Force Exchange Service*, 680 F.2d 779, 786-87 (D.C.Cir.1982). While the Board and OSC also have particular duties regarding certain sections of Title 5, see 5 U.S.C. §§ 1212(e) and 7701(k), OPM continues to play a role in administering the civil service. We held in *Taylor*, 1 M.S.P.R. at 593-94, that OPM rather than the Board has the authority to regulate with regard to employee coverage. We find nothing in the WPA itself or its legislative history to suggest that Congress intended to limit OPM's role to the extent that 5 U.S.C. §§ 1221(a) and 2302 are no longer “laws administered by [OPM]” and therefore broaden the class of employees with a right to file an IRA appeal to include AAFES employees.

The appellant's argument that his right to file an IRA appeal flows from OSC's authority to seek corrective action on his behalf for violations of 5 U.S.C. § 2302(b)(8) is also unpersuasive. See PFR File, Tab 1. OSC determined that it lacked jurisdiction over the appellant's complaint because, under 5 U.S.C. § 2105(c), NAF employees are generally excluded from the coverage of Title 5. See PFR File, Tab 1. We agree. Under 5 U.S.C. § 1214(a), OSC is charged with investigating allegations of prohibited personnel practices defined at 5 U.S.C. § 2302(a)(2) as certain enumerated actions “with respect to an employee in, or applicant for, a covered position....” Thus, the protections of 5 U.S.C. § 2302 are limited to employees or applicants for employment as defined by 5 U.S.C. § 2105.

Moreover, even if OSC had the authority to act on behalf of the appellant, that authority would not enable the appellant to file an IRA. The individual right to appeal to the Board alleging a violation of 5 U.S.C. § 2302(b)(8) derives from 5 U.S.C. § 1221(a), the IRA provision of the WPA, not from 5 U.S.C. § 2302(b) itself. The Board has consistently held that 5 U.S.C. § 2302(b) is not an

independent source of Board jurisdiction.<sup>1</sup> See *Wren v. Department of the Army*, 2 M.S.P.R. 1, 2 (1980), *aff'd sub nom. Wren v. Merit Systems Protection Board*, 681 F.2d 867, 871-73 (D.C.Cir.1982). The appellant is not covered by the WPA because he is excluded from the definition of employee under 5 U.S.C. § 2105(c).<sup>2</sup>

Accordingly, we find that the Board does not have jurisdiction over the appellant's appeal.<sup>3</sup>

### ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

### NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, DC 20439

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<sup>1</sup> The appellant argues that the agency is subject to the provisions of 5 U.S.C. § 2302 because it is an agency as defined in 5 U.S.C. § 2302(a)(2)(C). Assuming arguendo that the appellant is correct, that fact does not afford the Board any jurisdiction over the appellant's claim because 5 U.S.C. § 2302 does not grant jurisdiction to the Board. *Wren v. Department of the Army*, 2 M.S.P.R. 1, 2 (1980), *aff'd*, 681 F.2d 867, 871-73 (D.C.Cir.1982).

<sup>2</sup> We note that under 10 U.S.C. § 1587 NAF employees are protected from reprisal for whistleblowing pursuant to procedures adopted by the Secretary of Defense. Neither the WPA nor its legislative history indicate any Congressional intention to augment this protection through application of the WPA to employees otherwise excluded.

<sup>3</sup> We do not reach the issue of the timeliness of the appellant's IRA appeal because we find that the Board has no jurisdiction over his claim. See *Funk v. Department of the Army*, 44 M.S.P.R. 320, 322 (1990), *modified on other grounds*, *Popham v. U.S. Postal Service*, 50 M.S.P.R. 193 (1991).

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

For the Board  
Robert E. Taylor, Clerk  
Washington, D.C.